IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CENTRIPETAL NETWORKS, INC.,	)	
	)	
Plaintiff,	)	
v.	)	Civil Action No.:
	)	2:18cv94
CISCO SYSTEMS, INC.,	)	
	)	
Defendant.	)	

TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS

Norfolk, Virginia
September 9, 2020

BEFORE: THE HONORABLE HENRY C. MORGAN, JR.
United States District Judge

Appearances: (Via Zoom)

KRAMER LEVIN NAFTALIS & FRANKEL, LLP
By: PAUL ANDRE
Counsel for Plaintiff

DUANE MORRIS, LLP
By: LOUIS NORWOOD JAMESON
Counsel for Defendant

P R O C E E D I N G S

(Proceedings commenced at 2:28 p.m. as follows:)

COURTROOM DEPUTY CLERK: Civil Action No. 2:18cv94, Plaintiff Centripetal Networks, Inc. v. Defendant Cisco Systems, Inc.

For the plaintiff, Mr. Andre, et al., are you ready to proceed?

MR. ANDRE: We are, Your Honor.

COURTROOM DEPUTY CLERK: For defendant, Mr. Jameson, et al., are you ready to proceed?

MR. JAMESON: Yes, we are, Your Honor.

COURTROOM DEPUTY CLERK: And the call is connected.

THE COURT: All right. I have some additional information which is in the process of being emailed to Mr. Noona and Mr. Carr. When the Court received the information from my administrative assistant about the Cisco stock, we were in Maine on vacation. That doesn't mean that the Court's not working; in fact, I did work while I was in Maine and I always do. But other than dealing with that particular point, I didn't do any other work on this case.

Now, the problem that arose with respect to the case was how to separate or divest the stock, how best to do that, which presented a problem. On the one hand, we could just sell

the stock immediately which would not result in a taxable event for us, or the other alternative that occurred to me was to have it transferred to a blind trust. Now, the simplest thing would be to sell the stock; however, the problem that that caused is that the Court had already strongly indicated that it might be considering awarding damages in the case, and so I asked for additional evidence on damages, and that might mean that the Court's judgment would have an adverse effect upon Cisco's stock. So I was concerned about that, because that would defeat the very purpose of the Rules. It's a bit unusual to have a party which owns the stock be the one objecting to its ownership. So I was concerned that, to the extent that the Court's ruling might have an adverse effect on the stock price -- I don't know if it will or not -- that that would be defeating the very purpose of the Rules.

So I thought about that while I was on vacation and concluded that while that would save us a little money and be a temporary solution, that the better solution was to divest myself of any contact with the stock by having it transferred to a blind trust, which my wife agreed to do, meaning that the property is withdrawn from her account and transferred to the trust.

I contacted my attorney as soon as -- or I should say our attorney as soon as I returned from Maine, and he told me he never drawn such a trust before, but that he would undertake it.

And he completed it, and my wife and he have signed it, and a copy of the trust is being emailed to Mr. Carr and Mr. Noona, who I assume can pass it on to other counsel.

There was one other, probably a non-issue, but I want to bring it to the attention of counsel, the advisory company that I have recently relied on in buying and selling stocks, in addition to recommending Zoom, which I think we talked about at the very beginning of the case, also recommended a stock called Crowd Strike. And so I bought CrowdStrike. And my wife called her broker about buying CrowdStrike, and as a result she bought CrowdStrike too. Then I came to the realization that CrowdStrike was a direct competitor of both parties in this case, and it also indicated on Exhibit PTX-1600 that CrowdStrike shared intelligence feeds with Centripetal. And so I thought to myself that if the Court's ruling in this case impacted Cisco in an adverse way, that could be construed as benefiting a competitor. And I didn't really think of CrowdStrike as a competitor initially, but then when I saw it on the list that the plaintiff produced, and the defendant also made reference to in the course of the trial, that I should simply sell it. Because I suppose in theory any competitor could benefit from a judgment which was adverse to one of its competitors. So I sold it and I recommended to my wife that she sell it, and initially her stock broker didn't want to sell it because even though she had asked him about it initially as opposed to him recommending

it, he said he thought it was a good stock and she ought to hold on to it, but she agreed to sell it also. So she sold it a day or two later after I did. So that's over with and gone. But the records of the purchase and sale of CrowdStrike are also being emailed to Mr. Noona and Mr. Carr.

Also I thought that I would be retired by now, and so I had signed an agreement with Regent University School of Law to teach two courses beginning this fall, two three-hour courses, one in intellectual property and the other in federal civil procedure. And the classes began on August 25th, and although all students and professors were given the option by the school to take the course -- to either teach or attend the course online, I did not feel that I should try to do it online from Maine or, as I eventually decided, online from here either. Regent took great precautions to require everyone coming in to the law school, including me and all its professors and students, to be tested for the virus. And as a result of that I've been teaching in the classroom. Some of the students had taken it online and some by the Internet. I say that because it impacts the Court's ability to produce an opinion in the case. We were asked not to publish an opinion by Cisco, and I haven't worked on the case at all since I found out about the Cisco stock. I haven't done anything on it. And going forward, I can't devote the same amount of time to it as I was devoting before I started teaching. Obviously takes a lot of time to

teach two three-hour courses. That is considered a full load in many law schools. So I haven't done any further work at all on the opinion.

Now, as Cisco pointed out, I said in my notification that I had virtually completed the opinion. Now, if both parties want the Court to be more specific, I can be more specific and tell you exactly what I mean I've virtually completed it, but I'm not going to do that if either party objects. But I can tell you that if it turns out that I'm going to publish the opinion, it's going take some time to finalize it. We've completed the draft and our draft is currently at 130-some pages. It's a very complex case, and it's going to be the longest opinion I've ever written, by far. I usually try to write opinions briefly, but this case does not lend itself to writing a brief opinion. So it's obviously going to take time to edit it and to go from virtually finished to finished. As I said, most of the issues in the case I've already decided, and I'm not going to change my mind in the course of editing the opinion. But there are -- I haven't decided 100 percent of it, although I'm very close to that. If you want, both parties want an explanation of what I mean by virtual, I'll be glad to give it to you, otherwise I won't.

MR. JAMESON: Your Honor, this is Woody Jameson. On behalf of Cisco, I think in light of what you have already disclosed, we would request that you not provide any further

details at this point in time.

THE COURT: All right. I won't.

MR. ANDRE: And Your Honor, obviously for Centripetal we would like to get more information, because it would be important to the company. But I know you said if one party objects you won't disclose it. But we would -- it is something that is very important to our company, and this has been hanging out there for a while for us, and we would like to get it as soon as possible.

THE COURT: Well, other than the time that's elapsed since I first heard about the Cisco stock, I've spent almost all of my time -- I spent almost all my time on going through the record and drafting each portion of the opinion section by section, patent by patent. But as I said, I didn't do any more after the Cisco stock issue came up. So I don't, I just don't think it would be the proper thing to do to disclose what the opinion says. I haven't disclosed anything about what it says other than the fact that I did ask for additional information that was relevant to damages, and a party might draw an inference from my requesting that that I was considering damages. But beyond that, I haven't disclosed anything in the opinion, and I won't do so until after I resolve this issue.

So Cisco having made the motion -- and I would say that the Court did not invite any briefing, the briefing started with Cisco's motion, the only thing I got from Centripetal was

the statement that they didn't raise any objection to the stock issue -- so the Court didn't ask for any briefing, but once Cisco filed its motion, the Court did then, I believe, ask Centripetal to respond if it chose to do so, and Cisco filed a rebuttal brief if it chose to do so, and both of you filed briefs. Since Cisco is the moving party, I'll hear first from them.

MR. JAMESON: Thank you, Your Honor. Woody Jameson on behalf of Cisco Systems.

First let me say on behalf of both outside and in-house counsel for Cisco that the bringing of this motion was a very difficult one to put before the Court. I want to thank you, the Court, for its candor in informing the parties about the ownership interest by your wife of the Cisco stock, and we really hope that no disrespect is taken by the Court in the bringing of this motion.

Second, as you are aware, the basis for the recusal motion is found in the strict requirements of 28 U.S.C. 455, which is implemented by Congress and as interpreted by the courts, it was to create bright-line rules when it came to judicial conflicts to ensure the public's absolute confidence in the judicial system and to avoid any possible appearance by a judicial officer of impropriety.

For the reasons that we lay out in our opening brief and in our reply brief, we submit that recusal is required in

this case under both 28 U.S.C. 455(b) and under 28 U.S.C. 455(a) and (c), and we believe that recusal is required without the Court issuing a merits decision on the bench trial. With respect to the facts as known at the time of the briefing, we believe that our opening brief and our reply brief crystallize why recusal is required. Absent questions from the Court, Cisco will rest on its briefing.

I would like to make some brief comments based on new developments as you've laid out today. First, with respect to transferring the stock into a blind trust, it is not clear to me that that constitutes a proper divestiture under 28 U.S.C. 455(f). And I am doing this, Your Honor, absolutely on the fly, but I would call your attention to Advisory Opinion No. 110 which appears to address whether or not issues can be cured by transferring assets into a blind trust. And based on a review on the fly of that advisory opinion, it appears that it does not.

Second, under 28 U.S.C. 455(f), divestiture has to occur immediately or promptly upon learning of the issue, and second, it will not cure a violation of 455(b) if the financial interest is one that could be a substantially affected by the outcome of the case. And based on Your Honor's comments today, it appears that that is at least a possibility, particularly considering the relief that Centripetal has requested in this case, which is in excess of $500 million in damages, treble

damages, and an injunction against a core line of Cisco products.

So even if divestiture into a blind trust is possible, I still believe that there is a problem with 28 U.S.C. 455(f) because the interest could substantially be impacted by your decision in this case. And under those circumstances, 28 U.S.C. 455(f) is not available, and that would mean that under 28 U.S.C. 455(b), recusal is required.

And with that, Your Honor, I have no further comments absent questions for the Court, but I would like the opportunity to respond to any arguments that Centripetal may make.

THE COURT: All right. Mr. Andre?

MR. ANDRE: Thank you, Your Honor. May it please the Court.

Recusal is not warranted in this case. In fact, it would be improper to recuse yourself on this case given the facts here. Recusal is very fact-driven. And the facts as we know it before today and now after today, dictate recusal is not necessary and would be just the opposite. In fact, every circuit in this country has stated that a judge is as much obligated not to recuse himself when it is not called for as he is obligated to when it is called for. And in this case, this Court is obligated not to recuse itself given these facts.

One fact that cisco has ignored consistently in this proceeding, on this motion, is the last sentence of Your Honor's

email to the parties. The very last sentence stated "Since I did not know that my wife owned the stock until August 11th, 2020, it did not and could not have influenced my opinion on any of the issues in this case." That fact is dispositive of any recusal motion in and by itself.

Cisco said they're moving under 455(a), 28 U.S.C. 455(a), and the standard for recusal under 455(a) is, recusal is committed to the Court's sound discretion. This is up to the Court under 455(a). It is waivable by the parties. It is not necessarily something that is not waivable. And nothing in this case has indicated the Court's bias. In fact, just the opposite. Your Honor has been extremely forthright when Mr. McKloskey, who I see on the screen, when he made an appearance you were very forthright about your relationship with Mr. MacBride. We had no objection. When we decided to use Zoom, as Your Honor mentioned earlier today, you were forthright about your ownership stock in Zoom. And when you found out about your wife's stock, you notified the parties the day after.

So Cisco's attempting to say, they're using a 455(b) argument to raise a 455(a) recusal. But the standard for that is the reasonable person standard. And what this case would require is a reasonable person, looking at all of the facts in this case, would believe that the Court actually did know about the stock that his wife had in Cisco at the time you decided to take this case on. That's what a reasonable person would have

to believe. And given the facts here, there is just no possible way a reasonable person would ever believe that. I think every -- any set of facts you would look at here, you would believe the Court was not aware of the stock until the Court sent us the email on August 11th and August 12th, that time period. So there's absolutely no basis under the reasonable person standard for recusal under 455(a).

Under 455(b), you had to have stock that could be substantially affected. And in this particular instance, the very first sentence of 455(b) is, at 455(b)(4), is he knows. As Your Honor said, you did not know when you decided the issues in this case. So 455(b) doesn't trigger until you actually do know of the stock.

And Your Honor's comments today on the divestiture of the stock and even the divestiture of a potential competitor to the two parties -- and just for Your Honor's information, we just found out that CrowdStrike was an old partner of Centripetal, but there's no longer a relationship there at all with Centripetal. So...

THE COURT: Well, it said that they exchanged intelligence feeds.

MR. ANDRE: They used to. That time -- they no longer do that. They did previously. But just as we sit here today, they do not.

But that being said, the fact you went over and beyond

what is required to divest of even that stock, a competitor's stock, I think cures any issues on 455(b).

The curing provision of 455(f) was brought in in 1988 for this very purpose. The Court has dedicated a lot of resources, a lot of time to this case, and 455(f) was put in place for this exact type of situation.

Your Honor has acted exactly as Congress had intended with 455(f), and we don't think there is any basis whatsoever for recusal in this case.

Unless Your Honor has any further questions, I will...

THE COURT: All right.

Mr. Jameson, do you wish to reply?

MR. JAMESON: Yes, Your Honor, very briefly.

With respect to 455(b) -- and our reply makes this point -- but Your Honor absolutely knows now about the Cisco stock and you obviously let the parties know about that. The Court has made clear today that there is work to be done on the opinion, and therefore 455(b) is absolutely triggered in this situation.

With respect to 455(a), I believe that Centripetal is really misstating the law. Basically what the argument that Centripetal is making is that if this objective person, this reasonable observer was basically sitting in the Court's shoes and knew what the Court knew, that there wouldn't be an issue here. But the cases address that, and they make it crystal

clear that that's not really what a reasonable observer does. And in fact -- and we cite this in our reply brief, and Your Honor I would encourage you, I believe the Chase Manhattan case, it really addresses virtually every issue that's before you right now and it does it in a very methodical fashion. But in the concurring opinion, Judge Jacobs stated that "The standard that properly governs the panel opinion is what a reasonable person would believe, knowing the salient circumstances, not what a reasonable person would think who had the benefit of inside knowledge about the work of courts, of particular judges, and of judges in general."

And Judge Jacobs concluded, and I want to echo this, "I mention them only to emphasize that the panel opinion cannot be fairly read to cast the slightest aspersion on an estimable senior judge." And Your Honor, that's not what we're here to do. That's not what Cisco is doing. This is not about whether you are being impartial or not. We believe you have every intent of being impartial. But that's not the test under 455(a). It is what someone outside of these proceedings would possibly believe looking at the record. And under 455(c), the statute has an affirmative obligation of the Court to keep informed of the stock holdings of both Your Honor and your spouse. And based on this record, the only thing that we know is that the stock holdings were uncovered as part of an annual disclosure obligation. We don't know what protocols you had in

place to ensure that conflicts like this did not ever come to this point in a case. And we cite in our reply brief a number of cases where judges outline the protocols that they have in place, and we also cited to the Fourth Circuit's kind of guidance on issues that courts should do to ensure that conflicts are readily discovered. And on this record, all that Cisco knows is that your wife bought stock in October of 2019 to a named party in a high-profile case before you, and that purchase was not discovered until after the trial was complete some nine months later. And so an issue that is at the heart of this is whether or not reasonable efforts were actually taken under 455(c) to ensure that this type of conflict was discovered as promptly as possible. And it's our reading of the cases, and particularly Chase Manhattan, and reading the guidance by Shell Oil and the Supreme Court's decision that we cite in Liljeberg, that a reasonable person would believe that the Court would have known about the stock purchase long before this case was tried, and that under those circumstances, under 455(a), there is still a violation under 455(b), and as the Court held in Chase Manhattan, divestiture after the fact does not cure the problem.

Absent questions, Your Honor, that's all that I have.

THE COURT: All right. Well, I think the cases cited by the plaintiff are very different factually than this situation -- I mean by the defendant, excuse me. This same almost identical situation arose in a case in the Eastern

District of Virginia. It's Virginia Central Telephone Company of Virginia v. Sprint Communications, decided by a senior district judge in Richmond. The citation is 211 Westlaw 6178652 with facts almost identical to this where the judge was in the process of making his decision when he discovered that he owned stock in his IRA. I think it's clear from the fact that the Court did take a number of steps in this case to try to assure its impartiality before this issue even arose that the Court had no knowledge of this, and therefore the defendant is relying strictly on "should have known".

As I said, I pointed out my close relationship with one of the attorneys associated by the defendant as soon as I learned of it. As soon as Zoom came into the issue, I told the attorneys I owned Zoom. I bought CrowdStrike, and as soon as I learned that they were a competitor and that Centripetal was mentioned as someone with whom they exchanged threat intelligence feeds, I sold the stock, as did my wife.

Now, the closing of the defendant's rebuttal brief says that they never should have had to have filed a motion in this case because the judge, me, should have disqualified himself automatically because of the existence of bright-line rules. Well, people try to write rules as bright-line as they can, but they don't turn out that way in most cases. And certainly not in this situation. The existence of so many cases interpreting what the bright-line rule means demonstrates that

the line can't be but so bright, because the Court not only has a duty to recuse itself when it's appropriate, but has the duty not to recuse itself when it's not appropriate, which is entirely overlooked in the defendant's rebuttal brief.

To say that the Court should have automatically recused itself is contrary to the Court's duty to the parties and duty to the concept of judicial economy and Rule 1 calling upon the Court to exercise its best effort to resolve cases fairly, justly and inexpensively. The expenses that the parties went through to present this case are, I'm sure, enormous, the judicial time that has gone into this case is enormous, and I think all of these points are made in Judge Payne's opinion when he was faced with a similar situation in this Richmond case.

MR. JAMESON: Your Honor, may I comment briefly on Judge Payne's opinion?

THE COURT: No. You've had your opportunity. Why do you want to interrupt again?

MR. JAMESON: Because it's the first that the opinion has been raised. But if you don't want to hear --

THE COURT: Well, if you didn't do your research I can't help you with that, Mr. Jameson.

MR. JAMESON: Your Honor, I actually did do the research and it's actually in our reply brief, both the district court opinion and the Court of Appeals' review of that opinion at the Fourth Circuit.

THE COURT: Well...

MR. JAMESON: There's a very important distinction I would like to make on the record for you.

THE COURT: Go ahead.

MR. JAMESON: In that case, Judge Payne, he owned stock in a IRA in which he had no control over the purchasing decisions, but instead it was a managed fund. And there is an express exception for that situation under 455(d)(4)(i), "Ownership in a mutual or common investment fund that holds securities is not a financial interest." And that is precisely the grounds that the Court of Appeals found was a reason that 455 did not apply to the situation that Judge Payne faced.

THE COURT: Right. In this case, the stock was owned in my wife's account for which I had no control, and I didn't learn about it until I learned about the fact that it had been purchased at the recommendation of her broker. I had no control over that. In Judge Payne's case, it was his IRA and he got reports on it. I didn't get any reports on my wife's accounts. So I think the situations are very much the same.

Now, what put the Court in a very difficult position at the beginning was it's unusual in the sense that the party requesting recusal was the party -- was the stock that was owned by my wife. It wasn't the opposing stock. And that put the Court in the position of how to resolve the potential problem with the stock. As I said, I could have immediately just said

sell the stock without any further ado. But when I thought about the consequences of doing that, it would lead to exactly the opposite of what the rules are designed to prevent, which is using inside information to potentially profit my wife's account. Because if the case, as you apparently are assuming, will have any kind of impact on the stock, I would have benefited myself, considering my wife owns the stock, it would have benefited us as husband and wife to sell the stock. So I determined that that was not appropriate. Because I think it would be a major triumph of form over substance to just go ahead and sell the stock and let come what may. And that's why I took the additional step of asking my attorney to create the trust so that it would be placed beyond my control and I would not potentially benefit if the Court's decision adversely impacted Cisco. So it was kind of a reverse conflict which created a situation which is unique.

But as I say, I think the cases are very -- the case with Judge Payne is very similar because of the fact that it was in his IRA which he has access to, but it was managed by someone else. So someone else could take action that he wouldn't know about on a continuous basis. And that's the same thing here. I don't know on a continuing basis what stocks my wife buys and sells. She has more than one account, and what we do is we try to get them all together and put them on our report. And that's what we did in this case. So I think that the case is very

distinguishable factually from the cases that Cisco relies upon, and it is unique in the sense that it is unusual, though certainly permissible, for the party in which she owned the stock to be the one complaining. You certainly have a right to do that. But it did create an unusual situation for the Court, and I dealt with it in the best way I thought that I could.

So the Court will decline Cisco's motion that it recuse itself and prepare an opinion explaining the reason for its doing so, and thereafter -- and I can't promise how soon it will be, the opinion on the merits of the case.

All right. Is there anything further from counsel?

MR. ANDRE: Nothing from Centripetal, Your Honor. Thank you for your time.

MR. JAMESON: Nothing from Cisco, Your Honor. Thank you.

THE COURT: All right. Then I will end the hearing at this point.

(Whereupon, proceedings concluded at 3:16 p.m.)

CERTIFICATION

I certify that the foregoing is a true, complete and correct transcript of the proceedings held in the above-entitled matter.

Paul L. McManus, OCR

Digitally signed by Paul L. McManus, OCR
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Paul L. McManus, RMR, FCRR

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Date